A

RE LING LEE SOON; EX P RHB BANK BHD

HIGH COURT SABAH & SARAWAK, SIBU
SUPANG LIAN J
[BANKRUPTCY PROCEEDINGS NO: SBW-29NCC-190-5-2014]
2 NOVEMBER 2018

B

BANKRUPTCY: *Public examination – Public examination of judgment debtor – Applicant as friend of judgment debtor filed application to vary order for public examination in court of judgment debtor to private interrogatory process under oath at office of Director General of Insolvency – Whether application res judicata and abuse of process – Whether applicant out of time to seek variation of public examination order – Whether O. 42 r. 13 Rules of Court 2012 applicable – Whether applicant had locus standi to make application – Whether necessary and imperative to publicly examine judgment debtor – Bankruptcy Act 1967, s. 17(1) – Bankruptcy Rules 1969, r. 149(1)*

C

D

A judgment for the sum of RM55,000,000 was obtained by Lembaga Tabung Angkatan Tentera ('LTAT') against a judgment debtor in the High Court. Subsequently, the judgment debtor was adjudicated a bankrupt on the petition of RHB Bank Berhad ('RHB'). LTAT and two other creditors of the judgment debtor, namely RHB and Danaharta Urus Sdn Bhd lodged a proof

E

of debt with the Director General of Insolvency ('DGI'). On the application of the DGI, the Deputy Registrar granted an order directing the judgment debtor to attend a public examination at the High Court. The applicant, who claimed to be the friend of the judgment debtor, filed summons in chambers (encl.105) to seek dispensation of the public examination on behalf of the

F

judgment debtor. The applicant claimed that the judgment debtor was suffering from physical afflictions which made him unfit to attend public examination in court. The Deputy Registrar dismissed the application. Hence, the applicant filed the present application (encl. 136) under r. 149(1) of the Bankruptcy Rules 1969 ('BR') and s. 17(1) of the Bankruptcy Act 1967

G

('BA') to vary the order for public examination in court of the judgment debtor to a private interrogatory process under oath at the office of the DGI based on medical grounds. The DGI, RHB and LTAT opposed the application. The Senior Assistant Registrar ('SAR') dismissed the application. Hence, this appeal. The applicant emphasised that this was an

H

application pursuant to the second limb of the proviso to s. 17(1) BA which allowed for the variation of the manner and place of the examination of the judgment debtor. According to the applicant, the judgment debtor was willing at all times to provide information and answers to all queries by the DGI and the creditors. The judgment creditor, however, argued that, *inter alia* (i) the application was *res judicata* and an abuse of process; (ii) the

I

applicant was out of time to seek a variation of the public examination ('PE')

order as it was filed more than one year after the PE order was granted which was out of the 30 days' time period allowed for variation of the PE order under O. 42 r. 13 Rules of Court 2012 ('ROC'); (iii) that the applicant had no *locus standi* to make such application; (iv) that there was overwhelming evidence to show that the judgment debtor was physically fit to attend public examination in court; (v) that once the court granted the PE order, the public examination must proceed until its conclusion; and (vi) it was necessary and imperative to publicly examine the judgment debtor.

Held (allowing appeal):

(1) Enclosures 105 and 136 were totally separate and different applications under the two limbs of the proviso to s. 17(1) BA. Enclosure 105 showed that it was for 'dispensation of the public examination' which was an application pursuant to the first limb of the proviso. Enclosure 136, on the other hand, was to seek an order for the 'public examination to be varied with other manner such as interrogatories' which was an application pursuant to the second limb. The nature of the claim and the cause of action raised in encl. 105 was therefore different from that raised in encl. 136. There was no question of the application for variation under encl. 136 being *res judicata.* (paras 23 & 24)

(2) In determining whether the provisions of O. 42 r. 12 ROC apply, this court was guided by the maxim '*generalia specialibus non derogant'*, which in effect means specific law takes precedent over general law. Thus, the Bankruptcy Act is the specific law governing bankruptcy proceedings whereas the Bankruptcy Rules specifically governs procedural rules of bankruptcy. The maxim '*generalia specialibus non derogant*' dictates that the specific law and rules prevail over general law. Since encl.136 was made under s. 17(1) of BA and r. 149(1) BR, O. 42 r. 13 ROC had no application in the instant case. Thus, given the specific provisions providing for the variation of the order or public examination, the 30 day rule provided under O. 42 r. 12 ROC had no application in a bankruptcy matter. (paras 28-30)

(3) Neither the DGI nor any of the creditors had gone on affidavit to dispute the applicant's assertions on his capacity to make the application. Under r. 149(1), the application may be made by any relative or friend of the debtor who may appear to the court to be a proper person to make the application. Given that the assertions of the applicant on being a close friend of the judgment debtor had not been refuted, there was no reason to doubt the truth of the applicant's assertions. Thus, he was accepted as a friend of the judgment debtor and a proper person to make the application. (para 31)

(4) The conditions described in r. 149(1) are intended to be alternatives and are distinct and separate. The section provides for four distinct and separate grounds to apply to dispense with or vary the public

examination of the debtor. They are, a debtor (i) is a lunatic; (ii) suffers from mental affliction or disability rendering him unfit; (iii) suffers from physical affliction or disability rendering him unfit; or (iv) is in jail and cannot be conveniently brought to court. Clearly, if the debtor suffered from or fell under any one of these conditions, then an application to dispense with or vary his public examination may be made. Based on the medical reports of orthopaedic specialists, the judgment debtor was suffering from severe stenosis and due to this and degenerative spine, the judgment debtor suffered sciatica nerve shooting pain, numbness and acute spasm. All these sufferings were bodily pains from the judgment debtor's illnesses and these pains amounted to 'physical affliction' envisaged by the proviso to s. 17(1) BA. The injury or condition of the judgment debtor had made it difficult for him to be examined in court and he was deemed disabled from attending court for the purpose of public examination. (paras 35, 36, 45 & 46)

(5) The public examination herein had not begun and there was no question of the public examination being ongoing or yet to be concluded. There was nothing in the provisions of s. 17(1) BA to prohibit the making of an application to vary the manner and place of public examination once ordered. It is only when the order for public examination had been made that the judgment debtor's representative may thereafter apply to dispense or vary the PE. If the order for public examination had yet to be applied for and therefore not yet in existence, it did not stand to reason for anyone to be making application to dispense with or vary it as allowed under the proviso. For another, the judgment debtor normally would only become aware of the order for PE upon being served with the same. Thus, logically, the application for dispensation or variation as allowed under the proviso could only be made after the court had made the order for public examination and not before the order is made. (paras 56-58)

(6) There was no reason to doubt the efficacy of examination by way of written interrogatories made under oath. Written interrogatories would serve to confine the parties to the real issues. The judgment debtor would also be committed to the answers given under oath. This would dispose of the matter fairly and expeditiously. The applicant had proved on a balance of probabilities that the judgment debtor suffered from physical affliction and disability rendering him unfit to attend his public examination in court. For that reason, it was appropriate for this court to exercise discretion under s. 17(1) BA read together with r. 149(1) BR to direct the public examination of the judgment debtor to be conducted by way of written interrogatories at the office of the DGI. (paras 59 & 60)

Case(s) referred to:
Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***
Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***
Kejuruteraan Letrik Man Hoe Sdn Bhd v. Max-benefit Sdn Bhd & Anor; Cergas Tegas Sdn Bhd (Dalam Likuidasi), Liberty Wonder Sdn Bhd & Tow Lin Fook (Applicants) [2013] 1 LNS 1217 HC ***(refd)***
Kumpulan Kamuning Sdn Bhd v. Rajoo Thangaveloo & Ors [1983] 2 CLJ 242; [1983] CLJ (Rep) 207 FC ***(refd)***
Loh Eng Leong & Ors v. Lo Mu Sen & Sons Sdn Bhd & Ors [2003] 8 CLJ 265 HC ***(refd)***
Re Goh Wai Kah, Ex P Tan Lay Lee [2006] 6 CLJ 308 HC ***(dist)***
Tan Siew Chin Sdn Bhd v. Perbadanan Pengurusan Sri Pantai [2013] 5 CLJ 382 CA ***(refd)***
Wong Pot Heng v. Zainal Abidin Putih & Anor [1990] 2 CLJ 174; [1990] 1 CLJ (Rep) 312 SC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 17(1)
Bankruptcy Rules 1969, rr. 149(1), (3), 276
Companies Act 1965, ss. 181, 218
Rules of Court 2012, O. 13 r. 8, O. 14 r. 11, O. 42 rr. 12, 13, O. 56 r. 1(3A)

Other source(s) referred to:
Black's Law Dictionary, Abridged 6th edn, p 794

For the applicant - Clement Wong; M/s Clement & Company Advocs
For the judgment creditor - Timothy Lim Teng; M/s David Allen, Sagah & Teng Advocs
For the Director General of Insolvency Malaysia - Idlen Ibus
For the judgment creditor - Leong Hsin Ru; M/s Tang & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Supang Lian J:

Introduction

[1] On 26 September 2017, Peter Kuek Sze Chong ("applicant" or "Peter Kuek"), as the friend of the judgment debtor Ling Lee Soon (or "Alex Ling"), filed an application (encl. 136) under r. 149(1) of the Bankruptcy Rules 1969 ("BR") and s. 17(1) of the Bankruptcy Act 1967 ("BA") to vary the order for public examination in court of the judgment debtor to a private interrogatory process under oath at the Kuching office of the Director General of Insolvency ("DGI") based on medical grounds. The Senior Assistant Registrar ("SAR") dismissed the application on 4 December 2017. On 5 December 2017, the applicant filed the notice of appeal to the judge in chambers (encl. 161) against the decision of the SAR. There are no grounds of decision provided but I heard the appeal by way of a re-hearing on 9 January 2018. I allowed the appeal and ordered that the public examination of the judgment debtor proceed by way of interrogatories. Costs

here and in the court below in the sum of RM5,000 was ordered against the judgment creditors RHB Bank Berhad and Lembaga Tabung Angkatan Tentera (LTAT) jointly and severally. On 5 February 2018, LTAT filed an appeal against my decision.

[2] As only LTAT has appealed against my decision, I take it that the DGI and RHB Bank Berhad (as a judgment creditor) have accepted the decision. I will therefore confine this judgment to the issues raised by the LTAT, a judgment creditor.

Factual Background

[3] It is common ground that on 18 August 2014, LTAT obtained judgment for the sum of RM55,000,000 against Alex Ling in the Kuala Lumpur High Court [Suit No. D-22NCC-1184-2010]. On 18 December 2015, Alex Ling was adjudicated a bankrupt on the petition of RHB Bank Berhad ("RHB"). On 7 March 2016, LTAT lodged a proof of debt for the sum of RM58,826,712.33 with the DGI, being the sum due and owing by Alex Ling under the judgment as at the date of his bankruptcy. Apart from LTAT, two other creditors of Alex Ling, namely RHB and Danaharta Urus Sdn Bhd also lodged a proof of debt with the DGI. From their proof of debt, the debt owed by Alex Ling to RHB and Danaharta is in the sum of RM22,430,726.637 and RM25,360,241.468 respectively.

[4] On the application of the DGI, the Deputy Registrar granted an order on 29 June 2016 directing Alex Ling to attend a public examination at the Sibu High Court on 1 August 2016. However, the public examination was adjourned several times at the request of Alex Ling.

[5] On 21 October 2016, the applicant, who claims to be the friend of Alex Ling, filed summons in chambers dated 21 October 2016 (encl. 105) to seek dispensation of the public examination on behalf of Alex Ling. The applicant claims that Alex Ling is suffering from physical afflictions which make him unfit to attend public examination in court. The DGI; RHB and LTAT opposed the application. On 14 June 2017, the Deputy Registrar dismissed the application and ordered the applicant to pay costs of RM5,000 to LTAT.

[6] It was after this that the applicant had filed the present application that is encl. 136 on 26 September 2017. The applicant claims that Alex Ling is suffering from physical afflictions and disability which make him unfit to attend public examination in court. The applicant sought the court's discretion to vary and direct the debtor to be examined in other expedient manner and place, such as private interrogatories process under oath, to enable the debtor to provide and furnish information and answers required by the DGI and/or the creditors. The DGI; RHB and LTAT again opposed the application. On 4 December 2017, the SAR dismissed the application and ordered the applicant to pay RM1,000 cost to LTAT and RHB respectively.

The Application (encl. 136)

[7] The affidavits filed in respect of the application are as follows:

(i) Affidavit in support (3) by Tan Lean Sim dated 20 July 2017 (encl.138);

(ii) Affidavit in reply (3) by Peter Kuek Sze Chong dated 24 July 2017 (encl. 137);

(iii) Affidavit by Ling Lee Soon dated 9 October 2017 (encl. 144);

(iv) Affidavit in opposition by Zakaria bin Sharif (of LTAT) dated 3 November 2017 (encl. 149); and

(v) Supplementary affidavit by Ling Lee Soon dated 13 December 2017 (encl. 171).

Arguments Of The Applicant

[8] Mr Clement Wong for the applicant emphasised that the application is not for dispensation of the public examination as provided under the first limb of the proviso to s. 17(1) of the BA. Rather, it is an application pursuant to the second limb of the proviso for an order to direct the judgment debtor to be examined by way of interrogatories. The second limb of the proviso, Mr Clement Wong argued, allows for the variation of the manner and place of the examination of the judgment debtor. The latter is willing at all times to provide information and answers to all queries by the DGI and the creditors.

[9] Section 17(1) of the BA reads as follows:

> 17(1) Where the court makes a receiving order, the Director General of Insolvency may make an application to hold a public sitting on a day to be appointed by the court for the examination of the debtor, and the debtor shall attend thereat, and shall be examined as to his conduct, dealing and property:
>
> > Provided that when the debtor is a lunatic or suffers from any such mental or physical affliction or disability as in the opinion of the court renders him unfit to attend his public examination the court may dispense with such examination or direct the debtor to be examined in such manner and place as the court thinks expedient.

[10] Mr Clement Wong stated that the judgment debtor, Alex Ling, is now 73 years old. His physical afflictions and disability rendering him unfit to attend his public examination is due to the severe sciatica nerve shooting pain and back pain as a result of decompression of his spine since September 2016. He is unable to sit or stand still for more than ten minutes and he would need to stretch, swivel his legs, move his back and squat vertically and repeatedly to avoid pain, acute spasm and numbness and also his physical affliction due to sciatica-nerve shooting pain. This prognosis of the medical condition of the judgment debtor is established by the medical reports which have been annexed to the affidavits in support. They are:

A (i) medical report by Dr Tan Lean Sim, a general practitioner, of Semaba Nursing Home dated 11 March 2016 (exh. "PK1" of encl. 137);

(ii) medical report by Dr Denis Yu, consultant orthopaedic surgeon at Timberland Medical Centre dated 30 September 2016 (exh. "PK2" of encl. 137);

B

(iii) medical report dated 6 December 2016 by Dr Francis Ting Siew Sieng, consultant orthopaedic & spine surgeon at Normah Medical Specialist Center (exh. "PK3" of encl. 137);

(iv) medical report by Dr Mohamad Zaki Haji Mohd Amin, orthopaedic
C spinal surgeon of Sarawak General Hospital dated 6 October 2017 (exh. "LS1" of encl. 144); and

(v) Further medical report by Dr Denis Yu of Timberland Medical Centre dated 5 December 2017 (exh. "LS2" of encl. 171).

D **[11]** The reports above have diagnosed that Alex Ling suffers from stenosis and degenerative spine which cause him to experience constant intensive sciatica nerve shooting pain and back pain.

Arguments Of LTAT

E **[12]** Mr Timothy Lim Teng, learned counsel for the judgment creditor, argued as follows.

[13] First, the application is *res judicata* and an abuse of process. The applicant on behalf of Alex Ling had previously filed encl. 105 to seek dispensation of the public examination. In his affidavit-in-support, the
F applicant claimed that Alex Ling is physically unfit to attend court as he is suffering from intense back pain and will experience acute spasm and numbness if he sits still for too long. The applicant also relied on Tan Lean Sim's affidavit to support his assertion that Alex Ling is suffering from physical afflictions. The Deputy Registrar dismissed the application on 14 June 2017. On settled principles, the applicant is estopped from raising
G the same ground raised before the Deputy Registrar to support the present application, namely, encl. 136 as the issue is clearly *res judicata*: *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189 SC; *Tan Siew Chin Sdn Bhd v. Perbadanan Pengurusan Sri Pantai* [2013] 5 CLJ 382; [2013] 2 MLJ 513 CA; *Hartecon JV Sdn Bhd*
H *& Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104; [1996] 2 MLJ 57 CA are cited in support.

[14] Mr Timothy Lim argued that since the applicant did not appeal against the decision of the learned Registrar in respect of encl. 105, he is deemed to have accepted the correctness of the decision. The filing of encl. 136 is an
I abuse of process as it amounted to circumvent the appeal process.

[15] Second, the applicant is out of time to seek a variation of the public examination ("PE") order. The present application was filed on 26 September 2017, which was more than one year after the PE order was granted. This is out of the 30 days' time period allowed for variation of the PE order under O. 42 r. 13 of Rules of Court 2012. A

[16] Third, pursuant to the provisions of r. 149(1) of the BR, the application for an order to dispense with the public examination or that the debtor be examined at some other place other than usual, may be made by, "the official assignee, or by any person who has been appointed by any court having jurisdiction so to do to manage the affairs of or represent the debtor, or by any relative or friend of the debtor who may appear to the court to be a proper person to make the application." Hence, the application can only be made by a friend of the bankrupt if he or she appears to the court to be a proper person to make the application. The applicant is clearly not such a proper person because he merely claims to be a friend of Alex Ling for more than 50 years and never averred that he is presently taking care of Alex Ling or is staying with him. Given this, the applicant is not a person who can attest to Alex Ling's physical conditions. B C D

[17] Fourth, Alex Ling's supplementary affidavit affirmed on 13 December 2017 (encl. 171) ought to be disregarded as it was filed after the SAR had delivered her decision on encl. 136. By the supplementary affidavit, the applicant is in effect seeking to introduce new evidence without leave of the court, which is clearly not permitted under O. 56 r. 1(3A) of the RC 2012. Any submissions based on its content shall be regarded as evidence from the Bar which is inadmissible. E

[18] Fifth, on a plain reading, r. 149(1) of the BR is intended to apply to a bankrupt who is either incapable or who has a real difficulty to attend court, such as one suffering from lunacy or paralysis. It is not intended to apply to a bankrupt who merely alleges that he would be uncomfortable sitting or standing too long like Alex Ling. The limited application of r. 149(1) of the BR is reflected by its wordings which do not allow the bankrupt himself to apply for dispensation or variation of the public examination. This goes to show that the rule does not anticipate the bankrupt to be physically fit to make the application himself. F G

[19] In this regard, Alex Ling is fully able to make lengthy affidavits of over a hundred pages. His assertion that he is unable to attend court is plainly untrue and merely a self-serving statement to avoid public examination. Mr Timothy Lim's reasons for saying so are these: H

(a) firstly, on 27 October 2017 when encl. 136 was fixed for the first hearing, Alex Ling appeared in the Kuching High Court under a warrant of arrest issued by the SAR High Court Sibu and sat through the video conferencing which lasted for more than 30 minutes. His assertion that he is unable to sit for more than ten minutes is therefore not true; I

A (b) secondly, TLS who affirmed the affidavit dated 20 July 2017 has not produced evidence to show that he is a qualified doctor who is in the position to give an opinion on the medical condition of Alex Ling. Further, Dr Wong Hee Kit prepared the radiological report on 3 May 2010 which was more than seven years ago and irrelevant to the present
B physical condition of Alex Ling;

(c) thirdly, Alex Ling did not show that he has any difficulty sitting in court throughout the trial of the KL suit from 26 June 2012 and 17 July 2013;

(d) fourthly, the applicant's statements on Alex Ling's physical afflictions
C are inconsistent with the latter's affidavit evidence in the bankruptcy proceedings commenced by LTAT against him in Singapore. In the statement of affairs filed in the Singapore suit, Alex Ling did not say that he consulted TLS in 2016. Instead, he stated that he consulted a Chinese physician known as "Ah Chok" in Singapore and others in Kuala Lumpur, Hong Kong and China four to five times a month. In TLS'
D letter of 11 March 2016, he appeared to rely on the radiological report and consulted Dr Tan of Gleneagles Hospital and Dr Heng of Mount Elizabeth Hospital recently. This is in contradiction with Alex Ling's evidence in court that he ceased to consult Professor Wong Hee Kit, Dr Tan of Gleneagles Hospital and Dr Heng of Mount Elizabeth
E Hospital since 2013; and

(e) fifthly, Alex Ling's travel record shows that he is fully able to attend court for public examination. From his affidavits filed in the Singapore suit it is evident that between March and May 2016, he had travelled to Singapore at least two times to consult his lawyers there. Between
F years 2011 until 2016, he frequently travelled to various countries, including Vietnam, Australia, Taipei, Hong Kong, Singapore, China, New Zealand, Thailand, Indonesia and Maldives. In another affidavit affirmed on 30 May 2016 he stated that since 2012, he stayed in Singapore for approximately 40 days a year. In his letter dated
G 12 August 2016 to the DGI to request for adjournment of the public examination scheduled on 17 August 2016, Alex Ling stated that he had to travel to Singapore to prepare for the appeal filed by LTAT in the Singapore suit. In his letter dated 30 January 2016 to the Sibu Insolvency Department, he said he was away from Malaysia and he had
H to travel around South East Asia region and afar to broker deals on timber, gold, coal mining, properties and others to earn income. He stated as such in his statement of affairs as well. Mr Timothy Lim submitted that there was overwhelming evidence to show that Alex Ling is physically fit to attend public examination in court.

I **[20]** Sixth, once the court grants the PE order, the public examination must proceed until its conclusion ie, until the court is satisfied that the judgment debtor's affairs have been sufficiently investigated. Alex Ling is not allowed

to avoid public examination on the pretext that he is physically unfit to attend court - *Re Goh Wai Kah, Ex P Tan Lay Lee* [2006] 6 CLJ 308 was cited in support.

[21] Seventh, it is necessary and imperative to publicly examine Alex Ling for reasons as follows:

(i) the total debts owed by Alex Ling to LTAT, RHB and Danaharta is RM106,617,680.42 which is very substantial;

(ii) Alex Ling has failed to settle any part of the judgment debt due and owing to LTAT;

(iii) at the trial of the KL suit, Alex Ling admitted that he had transferred some of his shares in Buroi Mining Sdn Bhd to his son Adrian Ling. The Companies Commission of Malaysia records show that as at 30 June 2012, Alex Ling held shares in Bukit Young Goldmine Sdn Bhd, Priority Trading Sdn Bhd, Carino Sdn Bhd, Gladioli Resources Sdn Bhd and Gunong Wang Mining Sdn Bhd. However, by 10 November 2016, all of his shares in these companies had been transferred to Adrian Ling. As the transfer of the shares in these companies took place after the commencement of the bankruptcy proceedings, it is imperative to hold a public examination to determine the propriety of these transfers and whether they are fraudulent or void against the DGI;

(iv) Alex Ling has failed to make full and frank disclosure in his statement of affairs. In the statement, he claimed that he did not have any income or own any land. However, at the first creditors' meeting on 9 March 2016, counsel for RHB informed the creditors present that he discovered Alex Ling owns a parcel of land held under Lot 928, Engkilo Land District, Bawang Assan, Sibu; and he still owns 69 ordinary shares in Bukit Lintang Enterprises (1997) Sdn Bhd; and

(v) Alex Ling has failed to furnish any documentary evidence to show how he utilised the sum of RM55,000,000 paid by LTAT in 2007 when they purchased the 100,000 ordinary shares in Buroi Mining Sdn Bhd from him.

[22] On grounds set out above, Mr Timothy Lim submitted that the SAR was right to dismiss the application to hold the PE by way of private interrogatories.

Findings

[23] With respect, I disagree with the appellant on the *res judicata* and abuse of process argument. Instead, I accepted the arguments of the applicant that encl. 105 and encl.136 are totally separate and different applications under the two limbs of the proviso to s. 17(1) of the BA. A perusal of the relief sought in encl. 105 shows that it is for "dispensation of the public examination" which is an application pursuant to the first limb of the

A proviso. Enclosure 136 on the other hand is to seek an order for the "public examination to be varied with other manner such as interrogatories" which is an application pursuant to the second limb. The nature of the claim and the cause of action raised in encl. 105 was therefore different from that raised in encl. 136. That these separate applications are clearly demonstrated by the B practical effect if the court grants the relief of dispensation of the public examination. Under such an order, the creditors and the DGI would be denied the opportunity to examine the judgment debtor whether in court or out of court. In my judgment, based on the relief sought in encl. 105 the court had not decided on the issue of variation of the order for public examination C which is the relief sought in the encl. 136 application.

[24] In this regard, it is necessary to refer to the ruling on encl. 105 which, according to the records of notes of proceedings, was delivered by the Deputy Registrar, Tuan Ryan Sagiran Rayner Jr by way of email on 14 June 2017. In his email, the Deputy Registrar stated: "Briefly, in coming to the D above decision, I am of the opinion that there is no reasonable grounds forwarded by the applicant to justify the application made under r. 149(3) of the Bankruptcy Rules 1969 for dispensation of the PE order issued by this court. I also further rule that the application to vary the conduct/manner of the PE could not be considered here as the same had not been applied for E in the summons in chamber filed by the applicant here. As such, the applicant is required to apply for the same by filing a formal application for this court proper consideration and determination". Here, we have the very judicial mind that considered encl. 105 stating that the application for variation was neither the relief sought nor the issue before the court there. Clearly then, there is no question of the application for variation under F encl. 136 being *res judicata*. In addition, the judgment creditors (including LTAT) and the DGI should not have been taken by surprise by the filing of encl. 136 for the very same judicial mind had directed the applicant to file it.

G **[25]** In coming to this conclusion, I find support in the decision of *Loh Eng Leong & Ors v. Lo Mu Sen & Sons Sdn Bhd & Ors* [2003] 8 CLJ 265. The respondent in that case objected and applied to strike out the petitioners' application under s. 181 of the Companies Act 1965 on the ground that it is an abuse of court process as the petitioners had earlier filed another H application pursuant to s. 218. VT Singham J in dismissing the respondent's application held:

> Section 218 generally deals with circumstances where a company may be wound up upon the court's satisfaction that to do so is just and equitable and the only remedy available thereunder is winding-up. Section 181, on the other hand, gives power to the court to intervene and make any one I or more of the relief sought thereunder which may not necessarily be winding-up. The petitioners, hence, have a choice either to file a petition for winding-up pursuant to s. 218 or an originating oppression petition under s. 181 or both and proceed with the hearing even if both the

petitions contain the same set of facts so long as they are for different relief notwithstanding that one of the relief contained in the s. 181 is for winding-up.

[26] Applying the principle of law in *Loh Eng Leong*, with which I respectfully agree, the dismissal of encl. 105 meant that the court was of the view that the facts and the medical evidence of the disability of the judgment debtor to sit still for more than ten minutes presented to the court were insufficient to dispense with the public examination. To my mind, that is totally different from encl. 136 which prayed for "variation to the manner and place of the public examination" instead of total dispensation. In my judgment, notwithstanding that both encl. 105 and encl. 136 contained the same set of facts, it is not an abuse of court process if the reliefs sought are different.

[27] On the second point raised by LTAT based on the 30 day period allowed under O. 42 r. 13 of the RC 2012, it is to be noted that the preceding words of O. 42 are "where provisions are made in these Rules for the setting aside or varying of any order or judgment ..." To my mind, these words mean that this provision in O. 42 r. 12 is only for applications to set aside or vary orders made under the RC 2012 as for instance under O. 13 r. 8 and O. 14 r. 11.

[28] In any event, in determining whether the provisions of O. 42 r. 12 of the RC apply, I must be guided by the maxim "*generalia specialibus non derogant*", which in effect means specific law takes precedent over general law. In *Kejuruteraan Letrik Man Hoe Sdn Bhd v. Max-benefit Sdn Bhd & Anor; Cergas Tegas Sdn Bhd (Dalam Likuidasi), Liberty Wonder Sdn Bhd & Tow Lin Fook (Applicants)* [2013] 1 LNS 1217, the court applied this maxim and held:

> Therefore following the explanation that specific law must prevail over general law, the provisions of s. 274 of the CA must take precedence over O. 15 r. 6(2)(b) of RC. In this regard it should be easily appreciated that the provisions of the RC is of general application providing rules for civil proceedings while the CA is specific in nature for the provisions of companies matters, and in the context of the present case for companies actions and proceedings including winding-up.

[29] Likewise, in my view, the Bankruptcy Act is the specific law governing bankruptcy proceedings whereas the Bankruptcy Rules specifically governs procedural rules of bankruptcy. The maxim "*generalia specialibus non derogant*" dictates that the specific law and rules prevail over general law. For that reason, since encl. 136 is made under s. 17(1) of Bankruptcy Act 1967 and r. 149(1) of Bankruptcy Rules 1969, O. 42 r. 13 of the RC 2012 has no application in the instant case.

[30] As for the reliance on r. 276 of the BR to argue that in the absence of any rule regulating any bankruptcy proceedings, the Rules of High Court shall apply *mutatis mutandis*, I agree with the applicant that given the specific

provisions, namely s. 17(1) of the BA and r. 149(1) of the BR providing for the variation of the order for public examination, the 30-day rule provided under O. 42 r. 12 of the RC 2012 has no application in a bankruptcy matter.

[31] The third point raised by LTAT is on the *locus standi* of the applicant to make the application. The applicant in his affidavit-in-support (encl. 137) stated that he is a close friend of Alex Ling and has the *locus standi* to make the application under r. 149 of the BR. As pointed out by Mr Clement Wong, neither the DGI nor any of the creditors have gone on affidavit to dispute the applicant's assertions on his capacity to make the application. In fact Mr Timothy Lim had himself pointed out that under r. 149(1), the application may be made by any relative or friend of the debtor who may appear to the court to be a proper person to make the application. Given that the assertions of the applicant on being a close friend of Alex Ling have not been refuted, there is no reason for me to doubt the truth of the applicant's assertions. I accepted that he is a friend of Alex Ling and a proper person to make the application.

[32] The fourth point raised by LTAT that Alex Ling's supplementary affidavit (encl. 171) ought to be disregarded has, in my view, been rendered academic. On 28 December 2017, the applicant filed the necessary application (encl. 185) for leave to adduce the fresh evidence of the judgment debtor's medical condition *vide* the medical report dated 5 December 2017 prepared by Dr Dennis Yu. As at the date of hearing of the appeal on 9 January 2018, none of the opposing parties had filed any affidavit in opposition. That being the case, there was no material before me to refute the case for the applicant that the new evidence was not available at the time of the hearing before the SAR and that, if true, it would have been likely to have had a determining influence upon the decision of the SAR. I therefore allowed the application to adduce the fresh evidence which is the further medical report by Dr Denis Yu dated 5 December 2017 (exh. "LS2" of encl. 171).

[33] The fifth ground raised by LTAT is whether the applicant has shown that the debtor, Alex Ling, is suffering from physical afflictions and disability rendering him unfit to attend his public examination.

[34] In this regard, LTAT first argued that r. 149(1) of the BR is intended to apply only to a bankrupt suffering from incapacity such as lunacy or paralysis. I respectfully disagree and there is no case authority cited in support of this contention. Rule 149(1) reads:

> (1) An application for an order dispensing with the public examination of a debtor or directing that the debtor be examined in some manner or at some place other than is usual, on the ground that the debtor is a lunatic or suffers from mental or physical affliction or disability rendering him unfit to attend a public examination or that he is in gaol and cannot conveniently be brought before the Court, may be made by the Official Assignee, or by any person who has been appointed by any Court having

jurisdiction so to do to manage the affairs of or represent the debtor, or by any relative or friend of the debtor who may appear to the Court to be a proper person to make the application.

[35] The operative words are, "the debtor is a lunatic or suffers from mental or physical affliction or disability rendering him unfit to attend a public examination or that he is in gaol and cannot conveniently be brought before the court". It is to be noted that the word "or" is used. *AS Hornby's Oxford Advanced Learner's Dictionary of Current English* states that the word "or" is used to introduce an alternative. This means that the conditions described in r. 149(1) are intended to be alternatives and are distinct and separate. The section provides for four distinct and separate grounds to apply to dispense with or vary the public examination of the debtor. They are:

(i) debtor is a lunatic; or

(ii) debtor suffers from mental affliction or disability rendering him unfit; or

(iii) debtor suffers from physical affliction or disability rendering him unfit; or

(iv) debtor is in jail and cannot be conveniently brought to court.

[36] Clearly, if the debtor suffers from or falls under any one of these conditions, then an application to dispense with or vary his public examination may be made. This puts paid to LTAT's contention that the only exceptions provided under r. 149(1) of the BR are incapacity of the debtor due to lunacy or paralysis.

[37] To address Mr Timothy Lim's argument that Alex Ling's travel records, ability to attend court hearings and making lengthy affidavits of over a hundred pages means that his assertion of now being unable to attend court is plainly untrue and self-serving statement to avoid public examination, I think it appropriate to first ascertain the meaning of the words "physical affliction", "disability" and "unfit" as used in s. 17(1) of the BA and r. 149(1) of the BR.

[38] *Black's Law Dictionary*, Abridged 6th edn, at p. 794 defines "physical" as "relating or pertaining to the body, as distinguished from the mind or soul or the emotions." At p. 38, "affliction" is defined as "a distress of mind or body, that which causes continuing anguish or suffering." It follows that the meaning of physical affliction is something relating to the body which causes distress of mind or body resulting in continuing anguish and suffering. At p. 317 of the same Law Dictionary, the second meaning ascribed to the word "disability" is "physical impairment of the body that may or may not be incapacitating." As for the word "unfit", at p. 1063, it is given the meaning "unsuitable, incompetent; not adapted or qualified for a particular use or service; having no fitness."

[39] It is well-settled principle that where the words of the statute are precise and unambiguous, the literal and strict construction rule shall apply: see *Wong Pot Heng & Anor v. Zainal Abidin Putih & Anor* [1990] 2 CLJ 174; [1990] 1 CLJ (Rep) 312; [1990] 2 MLJ 410 SC and *Kumpulan Kamuning Sdn Bhd v. Rajoo Thangaveloo & Ors* [1983] 2 CLJ 242; [1983] CLJ (Rep) 207; [1983] 2 MLJ 400 FC. In light that the meaning of the words "physical affliction", "disability" and "unfit" used in s. 17(1) of the BA and r. 149(1) of the BR are clearly defined, there are no ambiguities. To my mind, these words ought to be construed in their plain and ordinary meanings.

[40] In the first medical report (PK1 of encl. 137) dated 11 March 2016, Dr Tan Lean Sim, a general practitioner, stated that Alex Ling, who has been his patient for a long time, suffered a serious stenosis (bone generated shooting pain at lumber 4 and 5) due to a slight accident and aging process. Alex Ling was bedridden for nine months and on a wheel chair to see doctors. He could not stand or sit for too long as he would go into spasm and experienced pain. Dr Tan annexed MRI (radiological) report dated 3 March 2010 prepared by Professor Dr Wong Hee Kit, Head of Orthopedic and Research Department, NUS Singapore where Alex Ling's medical condition is summarised as, "multilevel degenerative disc and facet joint disease in the lumber spine, worst at L3-4 and L4-5, where there is moderate to stenosis of the central canal. Mild to moderate exit canal stenosis at several levels as detailed. Posterior annular tears from T LS/51."

[41] On 30 September 2016, Dr Dennis Yu stated in his report (exh. PK2 encl. 137) that Alex Ling has a long history of leg pain and backache. MRI of L1 shows slight canal-stenosis of L3, 4, L4 & 5. Dr Dennis Yu suggested decompression surgery at L3, 4, L4 & 5.

[42] Dr Francis Ting was of the same opinion. In his report of 6 December 2016 (exh. PK3 encl. 137), he stated that Alex Ling has significant pain in his left lower limb. MRI showed severe spinal stenosis on L34, L45. He advised the patient to undergo instant decompression surgery with instrumented fusion.

[43] Dr Mohamad Zaki examined Alex Ling on 6 October 2017. In his medical report exh. LS1 he stated that Alex Ling had back pain and sciatica. He continued:

> I saw him [Alex Ling] today, his orthopaedic spinal problem is 1) multilevel Degenerative spine disease at L3/L4 /L4/L5 worsen to L2-S1. Currently his disability is unable to sit and stand for long duration and require regular rest. Prolonged sitting during travelling may worsen his symptoms. His current medical problem is affecting his daily activity and spinal surgery may alleviate his symptoms which is "posterior lumber decompression and fusion of L3-L5". In view of his ongoing proceeding, kindly assist him.

[44] The latest medical report was from Dr Dennis Yu made on 5 December 2017 (exh. LS2). He stated that, "He [Alex Ling] is presently being prepared for surgery. Meanwhile, he is advised not to sit, walk and stand still for a time period of about ten minutes." A

[45] I agree with Mr Clement Wong that based on the medical reports of Dr Tan Lean Sim and the three orthopaedic specialists, the judgment debtor is suffering from severe stenosis on L34, L45 which has now worsened to L2-S1. Due to the stenosis and degenerative spine, the judgment debtor suffers sciatica nerve shooting pain, numbness and acute spasm. In my opinion, all these sufferings are bodily pains arising from the judgment debtor's illnesses and these pains amount to "physical affliction" envisaged by the proviso to s. 17(1) of the BA. B C

[46] In addition, Dr Mohamad Zaki and Dr Denis Yu, had commented that Alex Ling suffers from disability to sit and stand still for long duration of about ten minutes and prolonged sitting will worsen the symptoms. I agree with Mr Clement Wong that based on Dr Mohamad Zaki's and Dr Denis Yu's reviews and applying the plain and ordinary meaning of "disability", the illness, injury or condition of Alex Ling have made it difficult for him to be examined in court. In my judgment, Alex Ling is deemed disabled from attending court for the purpose of public examination. D E

[47] As for the requirement of being unfit, since Alex Ling is unable to sit and stand still for periods of ten minutes and would need numerous stand downs to stretch, swivel his legs, move his back and squat vertically and repeatedly to avoid pain, acute spasm and numbness, I agree with Mr Clement Wong that such physical condition and disability of the judgment debtor makes him unsuitable and unfit to attend public examination. F

[48] As regards the allegation that Alex Ling's assertions of being unfit are self-serving statements, it must be pointed out that at the hearing of encl. 136 in the court below, neither the DGI nor any of the creditors including LTAT submitted any medical report to the court to challenge the accuracy and correctness of the three medical reports prepared by Dr Tan Lean Sim, Dr Denis Yu and Dr Francis Ting, all submitted by the applicant on behalf of the judgment debtor. Indeed, at the hearing, Mr Timothy Lim proposed that an independent medical report be prepared by a specialist from the government hospital. Consequently, Alex Ling was sent to be examined by Dr Mohamad Zaki at the Sarawak General Hospital Kuching the medical report LS1 dated 6 October 2017 is the outcome. DGI and the creditors including LTAT had ample time and opportunity to challenge the three medical reports prepared by the orthopedic specialists from the private hospitals and the one medical report prepared by the specialist from Sarawak General Hospital specifically requested by Mr Timothy Lim. They never did and no contrary medical report was ever produced. G H I

[49] Instead, learned counsel for LTAT had assumed the role of a specialist of his own by commenting on the judgment debtor's past conduct to allege he is neither unfit nor disabled to attend the public examination. In view that learned counsel is not a qualified person to comment on the judgment debtor's medical condition, such allegations are at best statements from the Bar which have to be disregarded.

[50] With regard the allegations of the judgment debtor's regular visits for treatment including in Singapore, as pointed out by Mr Clement Wong, those were previous treatments in year 2010 at the National University Hospital (NUS) Singapore and between 2012 to 2014 with Ah Chok (Chinese physician) and Dr Chieng: see radiological report of Dr Wong Hee Kit dated 5 March 2010 annexed to exh. "PK1". Moreover, all the events alluded to by learned counsel for LTAT took place before the prognosis of worsened and severe stenosis with sciatica nerve shooting pain, numbness and acute spasm starting from Dr Dennis Yu's medical report of 30 September 2016 (exh. PK2 encl. 137) and backed up by the subsequent medical reports of Dr Francis Ting (exh. PK3 encl. 137), Dr Mohamad Zaki (exh. LS1) and the last report from Dr Dennis Yu dated 5 December 2017 (exh. "LS2").

[51] In respect of the allegation that Dr Tan Lean Sim is not a specialist, the three medical reports of the specialists did not contradict Dr Tan's findings. In fact, the latter reports confirmed the prognosis that the judgment debtor should not sit down for prolonged periods. Dr Dennis Yu's most recent report dated 5 December 2017 clearly indicate that the judgment debtor should not sit, walk and stand still for a time period of about ten minutes. Dr Denis Yu also advised the judgment debtor to use the walking stick to alleviate pains in the buttock. That was precisely the reason for the judgment debtor to go and see Dr Yu in early December 2017.

[52] In summary, there is no medical evidence before me to refute the four medical reports submitted by the judgment debtor. In the medical reports, it is stated that the judgment debtor is suffering from severe spinal stenosis (see the medical report dated 6 December 2016 by Dr Francis Ting ((exh. "PK3")); multilevel degenerative spine disease (see: medical report dated 5 October 2017 by Dr Mohamad Zaki ((exh. "LSI")) and disco ostcophytic disease on the cervical spine, commonly known as sacrolilac joint dysfunctional disease ("SJ") affecting specifically the pain at the buttock distinct from worsened lumber spine disease from L3, L4, L5 now to L2/S1 on sitting and standing [see: Radiological Report (MRI) dated 3 May 2010 from the NUS Singapore and comments by Professor Dr Wong Hee Kit, Head of Orthopedic and Research Department, that severe pain would come in later years due to the judgment debtor having fallen on his buttock on cement floor at the age of 11" (exh. PK1). Most importantly, the prognosis by Dr Mohamad Zaki and Dr Denis Yu that due to the worsened and severe stenosis with sciatica nerve shooting pain, numbness and acute spasm, Alex Ling suffers from disability to sit and stand still for long

duration of about ten minutes and prolonged sitting remains unrebutted. I agree with the submission of the applicant that because of the judgment debtor's medical condition, the judgment debtor could not be expected to concentrate during the examination process and numerous stand downs from the witness box will be required. As such, it would be impractical, nay, impossible, to conduct the public examination in the usual manner in open court. I should mention too that the words of Dr Mohamad Zaki imploring, "In view of his on-going proceeding, kindly assist him", also weighed heavily on my mind.

[53] For the reasons stated above, the applicant in my judgment, had proved on balance of probabilities that the judgment debtor is suffering from physical affliction and disability rendering him unfit to attend his public examination.

[54] The sixth issue raised by LTAT, relying on *Re Goh Wai Kah, Ex P Tan Lay Lee*, *supra*, is to the effect that once the order is made, the public examination must proceed to its conclusion and cannot be withdrawn or dispensed with. With respect, I disagree that the *ratio* in *Re Goh Wai Kah* applies to our present case. The facts of that case are different. There, the public examination had already begun and proceeding midstream when the DGI, who had been ordered by the court to obtain further financial records of the bankrupt, applied to withdraw the public examination. The Deputy Registrar allowed the application and struck it out. Thus, totally dispensing with the public examination.

[55] Thus, unlike in the present case where the application is for variation of the public examination and made by the representative of the judgment debtor, the application in *Re Goh Wai Kah* was made by the DGI to withdraw or dispense altogether with the public examination. More importantly, the public examination in *Re Goh Wai Kah* had started and was proceeding midstream when the application was made. In such circumstances, His Lordship Ramly Ali J, as he then was, had this to say (at pp. 322-323):

> [61] In the present case, the public examination has been granted. The court has also conducted the public examination. It is no longer at the stage of the DGI applying to the court for such public examination to be held. It is not open for the DGI, now to withdraw the public examination at his (or her) whims and fancies, particularly so when the examination has proceeded midstream in view of the fact that the DGI has yet to produce documents which they were required by a court order to obtain; the three witnesses subpoenaed have yet to finish giving their evidence; and the examination of the bankrupt was still ongoing and some documents which he was required to produce have yet to be produced.
>
> ...

A

> [68] The public examination in the present case is ongoing and yet to be concluded and premised on the express provision in s. 17(9) of the Bankruptcy Act 1967 requiring "that the affairs of the debtor must have been sufficiently investigated", before an examination can be declared to be concluded and brought to an end, the DGI has neither the right nor authority to withdraw the said public examination.

B

[56] From the passages reproduced above, to my mind the *ratio decidendi* of the case is that it was not open to the DGI to withdraw and altogether dispense with the public examination because the public examination had been conducted, was still ongoing and yet to be concluded. The *ratio* in that case is obviously not applicable to our present case because the present application is not to withdraw or dispense with the public examination, but to vary. More importantly, the public examination in the present case has not begun and there is no question of the public examination being ongoing or yet to be concluded.

C

D

[57] Additionally, in my opinion, there is nothing in the provisions of s. 17(1) of the BA to prohibit the making of an application to vary the manner and place of public examination once ordered. To my mind, s. 17(1) allows for two stages of proceedings. The first stage is encapsulated in the words, "Where the court makes a receiving order, the [DGI] may make an application to hold a public sitting on a day to be appointed by the court for the examination of the debtor, and the debtor shall attend thereat ..." At this first stage, the DGI makes the application and the court decides whether it is necessary to hold the public examination.

E

F

[58] Once the court orders for a public examination to be held, then an application can be made under the proviso to sub-s. (1) to either dispense with the public examination or vary it. The operative words of the proviso are: "Provided that when the debtor ... suffers from any such mental or physical affliction or disability as in the opinion of the court renders him unfit to attend his public examination, the court may dispense with such examination or direct the debtor to be examined in such a manner and place as the court thinks expedient." The phrase "renders him unfit to attend his public examination" connote that a public examination had already been ordered by the court. It is when the order for public examination had been made that the judgment debtor's representative may thereafter apply to dispense or vary the PE. For this reason, I disagree with the contention of the judgment creditor that the application for dispensation and variation can only be made before the order for PE is made. For one thing, the order for public examination will only emanate if the DGI applies for it. In my view, if the order for public examination has yet to be applied for and therefore not yet in existence, it does not stand to reason for anyone to be making application to dispense with or vary it as allowed under the proviso. For another, the judgment debtor normally would only become aware of the

G

H

I

order for PE upon being served with the same. Thus, logically, the application for dispensation or variation as allowed under the proviso can only be made after the court has made the order for public examination and not before the order is made.

[59] Finally, in reply to the seventh point raised by LTAT, in my opinion, there is no reason to doubt the efficacy of examination by way of written interrogatories made under oath. In my view, written interrogatories will serve to confine the parties to the real issues. The judgment debtor will also be committed to the answers given under oath. This will dispose of the matter fairly and expeditiously.

Conclusion

[60] For the reasons stated above, I was satisfied that the applicant had proved on balance of probabilities that the judgment debtor suffers from physical affliction and disability rendering him unfit to attend his public examination in court. For that reason, I thought it appropriate to exercise my discretion under s. 17(1) of the BA read together with r. 149(1) of the BR to direct the public examination of the judgment debtor to be conducted by way of written interrogatories at the office of the DGI in Kuching.